

## THE SCHWEGMANN CASE AND FAIR TRADE: AN OBITUARY?

FAIR Trade aims to safeguard traditional distribution patterns and protect producer brand names in consumer eyes. Chain, department and cut-rate stores, employing vigorous price competition, early threatened traditional distributors' established profit margins.<sup>1</sup> Loss-leader merchandising in nationally advertised products tarnished their consumer acceptance and discouraged other retailers from pushing the price-cut wares.<sup>2</sup> Worsted in the economic

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1. See ZORN & FELDMAN, *BUSINESS UNDER THE NEW PRICE LAWS* 7-22 (1937) (hereinafter cited as ZORN & FELDMAN). Department stores, mail order houses, chain stores and smaller "cut rate" outlets commenced operations at the turn of the century and achieved relative strength with increase in consumer mobility during the 1920's. Employing limited service, leader selling and geographic price discrimination as sales tactics and generally able to undersell smaller outlets because of purchasing advantages, advertising and economies of scale, they threatened the traditional distributor. See GRETHER, *PRICE CONTROL UNDER FAIR TRADE LEGISLATION* 225-55 (1939) (hereinafter cited as GRETHER); FTC, *FINAL REPORT ON THE CHAIN STORE INVESTIGATION* (1934) for a study of the growth, and prediction as to the future, of chain stores. The FTC felt the growth of chains "uncheckable." *Id.* at 86-7.

The legislation described in this comment may have slowed down the growth of chains and large distributors. Between 1920 and 1930, chains more than tripled their outlets. ZORN & FELDMAN at 7-8, 20 (1937). But from 1929 to 1939 growth was slow. Chains did 20.3% of the total retail business in 1929 and 21.7% in 1939. In the retail food trade, chains did 45.7% in 1929 and 32.4% in 1939; in drugs, 28.8% in 1935 and 27.1% in 1939. STOCKING & WATKINS, *MONOPOLY AND FREE ENTERPRISE* 48-9 (1951). (hereinafter cited as STOCKING & WATKINS). For a collection of general statistics of chains in the various distributive fields, see BOWMAN & BACH, *ECONOMIC ANALYSIS AND PUBLIC POLICY* 83-4 (1946).

"It is recognized now, of course, that these newer types on the whole introduced healthy competitive influences into the business of retailing." GRETHER at 229.

2. Leader selling is the use of spectacular price cuts on merchandise as bait to attract customers. Since price comparisons on nationally advertised products are readily made by consumers, these are the products typically cut. Loss-leader selling generally signifies that the price cut has carried below invoice cost. Consult Comment, 57 *YALE L. J.* 391 (1948). ZORN & FELDMAN at 265-74; Grether, *Experience in California with Fair Trade Legislation Restricting Price Cutting*, 24 *CALIF. L. REV.* 640 (1936). For a more detailed theoretical analysis, see GRETHER at 199-224; MILLER, *UNFAIR COMPETITION* 249-57 (1941) (hereinafter cited as MILLER).

Producers claimed that wildly disparate prices on an item destroyed consumer faith in its quality. And they feared that retailers would refrain from handling items that were price cut so frequently as to destroy profit in handling them. See 2 *CCH TRADE REG. REP.* ¶ 7052; WEIGEL, *THE FAIR TRADE ACTS* 11-17 (1938). The Supreme Court at one time accepted this argument. *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 193 (1936) ("The primary aim of the law is to protect the property—namely, the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end in itself.").

struggle, traditional wholesalers and retailers organized and sought legislative help.<sup>3</sup>

Beginning in the 1930's, states enacted Fair Trade laws legalizing producers' resale price maintenance.<sup>4</sup> Producers thus could contractually bind distributors not to resell below producer-set minimum resale prices<sup>5</sup> on branded goods sold in competition with merchandise of the same general class.<sup>6</sup> But since the first Fair Trade laws bound only the contracting parties,<sup>7</sup> non-signing distributors' price cutting often thwarted price stabilization efforts.<sup>8</sup> Many retailers would not sign. And refusals to sell to recalcitrant

3. The initial drive to effect legal resale price maintenance and preserve traditional distribution channels came from manufacturers' groups. As chains became a substantial market, moving large volumes and capable of using private brands to counter fixed prices, manufacturer interest declined. But the movement was carried on with vigor by small retailers and their wholesalers. STOCKING & WATKINS at 328-29; ZORN & FELDMAN at 275-96; FTC, REPORT ON RESALE PRICE MAINTENANCE, 5, 52-6, 87 *et seq.*, 847 *et seq.* (1945) (hereinafter cited as FTC REPORT). GREYER at 8; COVER, PROBLEMS OF SMALL BUSINESS 163, 189 (TNEC Monograph 17, 1941).

4. The earliest statute resembling modern Fair Trade was the New Jersey "Notice" Act of 1916 providing:

"It shall be unlawful for any merchant, firm, or corporation to appropriate for his or their own use a name, brand, trade-mark, reputation, or goodwill of any maker in whose product said merchant, firm, or corporation deals, or to discriminate against the same by depreciating the value of such products in the public mind, or by misrepresentation as to value or quality, or by price inducement, or by unfair discrimination between buyers, or in any other manner whatsoever, except in cases where said goods do not carry any notice prohibiting such practice. . . ."

FTC REPORT at 67; GREYER at 14, 56.

Modern Fair Trade dates from the California Law of 1931 which permitted trademark owners to establish resale prices by contract on items in "fair and open" competition with products of the same class. Sales closing out stocks, of damaged goods, and by court officers were exempted. GREYER at 17-21; see FTC REPORT at 67-87 for analysis of the early California Act and history of Fair Trade legislation.

5. Some state statutes legalize the fixing of absolute in addition to minimum resale prices. See note 81 *infra*.

6. See note 15 *infra*.

7. The original California Act of 1931 lacked nonsigner provisions. Failure of the act to achieve its goal led to its amendment in 1933:

"Willfully and knowingly advertising, offering for sale or selling any commodity at less than the *price stipulated in any contract entered into pursuant to the provisions of Section 1 of this Act, whether the person so advertising, offering for sale, or selling is or is not a party to such contract*, is unfair competition and is actionable at the suit of any person aggrieved thereby." (Emphasis added.) Reprinted in WEIGEL, THE FAIR TRADE ACTS 36 (1938).

Present nonsigner provisions are substantially identical in all states. See 2 CCH TRADE REG. REP. ¶ 8004 *et seq.*; WEIGEL, *supra* at 36-60.

8. See WEIGEL, THE FAIR TRADE ACTS 35 (1938). "The great majority of druggists gladly signed the price maintenance contracts. But the cut-rate druggists refused to do so." *Ibid.*

retailers were often fruitless, since price cutters surreptitiously obtained supplies from "signing" outlets eager to turn an arbitrage profit.<sup>9</sup> Moreover, refusals to sell might well isolate producers from access to increasingly dominant mass-selling outlets.<sup>10</sup> Since resale price maintenance enforceable only against contracting parties proved ineffective, later Fair Trade laws bound *all* distributors not to undercut knowingly the price stipulated in a Fair Trade contract with *any* distributive outlet.<sup>11</sup> These "non-signer" clauses, early upheld against due process challenge,<sup>12</sup> became the prime tool of state-sanctioned Fair Trade.<sup>13</sup>

To insulate Fair Trade from the federal antitrust laws' ban on

9. Cf. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *Cat's Paw Rubber Co. v. Barlo Leather Co.*, CCH TRADE REG. REP. '48-'51 DEC. ¶62,949 (S.D.N.Y. 1951).

10. "Perhaps most of [a manufacturer's] merchandise still goes through wholesalers and small independent retailers, but in view of the increasing importance of chains he will cut himself off from too large a part of his consumer market if he does not sell some of his goods through them; and, looking to the future, he does not dare place sole reliance on a single channel of distribution which may conceivably dwindle and dry up." McNair, *Marketing Functions and Costs and The Robinson-Patman Act*, 4 LAW & CONTEMP. PROB. 334,346 (1937).

11. See note 7 *supra*. Every state except Missouri, Texas, and Vermont and the District of Columbia enacted Fair Trade laws between 1931 and 1950. 2 CCH TRADE REG. REP. ¶7011 (1951). See *id.* at ¶8004 *et seq.* for texts of all state statutes. The laws are of two types: early laws follow the California model; later laws, such as the Connecticut statute, copy the National Association of Retail Druggists model. ZORN & FELDMAN at 297.

All laws are similar in their basic legalization of resale price maintenance contracts and coercion on non-signers. They differ on such details as whether wholesalers may establish Fair Trade and whether absolute as well as minimum prices may be contracted.

In the District of Columbia the Federal Trade Commission is currently engaged in prosecuting Fair Trade as an "unfair trade practice" violating Section 5 of the Federal Trade Commission Act. 20 U.S.L. WEEK 2264 (Dec. 29, 1951); 18 U.S.L. WEEK 2303 (Jan. 17, 1950).

Florida's Fair Trade law has twice been declared unconstitutional. *Bristol-Myers Co. v. Webb's Cut Rate Drug Co.*, 137 Fla. 508, 188 So. 91 (1939) (defective legislative title in that it failed to describe the nonsigner provision); *Liquor Store v. Continental Distilling Corp.*, 40 So.2d 371 (Fla. 1949) (emergency legislation; the emergency has ended.) See Comment, 7 WASH. & LEE L. REV. 28 (1950). The new Florida Fair Trade law, FLA. STAT. ANN. §541.001 *et seq.* (Supp. 1950) has recently had its nonsigner provisions sheared out by the Florida Supreme Court. See note 87 *infra*.

12. *E.g.*, *Seagram Corp. v. Old Dearborn Corp.*, 363 Ill. 610, 2 N.E.2d 940 (1936), *aff'd*, 299 U.S. 183 (1936). *But cf.* *Doubleday, Doran v. Macy & Co.* 269 N.Y. 272, 199 N.E. 409 (1936).

13. WEIGEL, *THE FAIR TRADE ACTS* 36 (1938); GREYER, at 18; FTC REPORT at 74. Not only the producer, but individual retailers may enforce against non-signers, *Port Chester Wine and Liquor Shop v. Miller Bros. Inc.*, 281 N.Y. 101, 22 N.E.2d 253 (1939); even where the suing retailer is himself a nonsigner, *Calamia v. Goldsmith Brothers*, 299 N.Y. 636, 795, 87 N.E.2d 50, 687 (1949); and an association of retailers has been permitted to sue as representative of injured

price fixing agreements, Congress in 1937 passed the Miller-Tydings amendment to the Sherman Act.<sup>14</sup> Carving an exception out of Section 1 of the Act, Miller-Tydings exempted "contracts or agreements" to maintain

retailers, *Iowa Pharmaceutical Association v. May's Drug Stores Inc.*, 229 Iowa 554, 294 N.W. 756 (1940).

See Comment, 36 CORN L.Q. 781, 785 (1951) for an excellent analysis of the essentials of a cause of action and defenses thereto under various Fair Trade statutes. Giving trading stamps as a blanket reduction on the price of all items, including Fair Trade products, may be considered price cutting. *Bristol-Myers Co. v. Picker*, 302 N.Y. 61, 96 N.E.2d 177 (1950); but see *Weco Products Co. v. Mid-City Cut Rate Drug Stores*, 55 Cal. App.2d 684, 131 P.2d 856 (1942). See generally Note, 64 HARV. L. REV. 1327, 1332-3 (1951). Fair Trade acts in 20 states specifically forbid giving trading stamps with purchases of Fair Trade items. *Ibid.*

14. The Miller-Tydings resale price maintenance act, 50 STAT 693 (1937), 15 U.S.C. § 1 (1946), was enacted in 1937 as an amendment to Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act. Taking the form of a proviso in Section 1 of the Sherman Act it states:

*"Provided, that nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears . . . the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts of agreements of that description are lawful as applied to intrastate transactions, under any statute, law or public policy now or hereafter in effect in any State, Territory or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, . . ."*

*Provided further, that the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers or between factors, or between retailers or between persons, firms or corporations in competition with each other. . . ."*

Prior to the amendment, resale price maintenance in interstate commerce was illegal under antitrust law. Early lower court cases had held resale price maintenance contracts valid for articles made by secret process. *E.g.*, *Dr. Miles Medical Co. v. Goldthwaite*, 133 Fed. 794 (C.C.N.D. Mass. 1904). However the tide soon turned. A similar system was held illegal in *Park and Sons v. Hartman*, 153 Fed. 24 (6th Cir. 1907). Finally in 1911, the Supreme Court, ruling on a like system in the form of agency contracts, held the Sherman Act to forbid contractual resale price maintenance. *Dr. Miles Medical Co. v. Park and Sons*, 220 U.S. 373 (1911) (suit for inducing breach of producer-distributor contract to maintain resale prices does not lie because contract illegal). See also *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908) (copyright owner does not have a right to fix resale prices on books); *Boston Store of Chicago v. American Graphophone Co.*, 246 U.S. 8 (1918) (patent holders may not fix resale prices by contract). And compare *United States v. General Electric Co.*, 272 U.S. 476 (1926), with *United States v. Masonite Corp.*, 316 U.S. 265 (1942) for decreasing possibility of legal resale price fixing by establishing resellers as agents of the producer.

minimum resale prices when sanctioned by state law.<sup>15</sup> But State Fair Trade devices, such as non-signer clauses, were unmentioned in the Congressional enactment. A proviso, however, specifically withheld Congressional approval from horizontal price-fixing between competitors on the same distributive level.<sup>16</sup>

15. See statutory text, note 14 *supra*. Miller-Tydings reiterated the typical provision under state statutes, requiring Fair Traded products to be in "fair and open competition" with goods of the same general class. *E.g.* statutes of California and Connecticut.

During Congressional debate, Senator Tydings thought this limitation "mountain-high." 81 CONG. REC. 7495 (1937). "There are on the market 25 or 30 varieties of tooth paste. Under the amendment, manufacturers may not combine with each other for the purpose of price maintenance; but if a manufacturer wishes to say that his particular kind of tooth paste may not be sold by a retailer at less than a certain minimum price, and that minimum price is high, other tooth paste manufacturers will come in and take his business." *Ibid.* But the mountain has thus far brought forth a mouse. Apparently only one case has rested on this limitation to deny Miller-Tydings protection to a Fair Trade arrangement. *Eastman Kodak Co. v. FTC*, 153 F.2d 592 (2d Cir. 1946), *cert denied*, 330 U.S. 828 (1947). *Cf. Missouri ex rel. Taylor v. Anderson*, CCH TRADE REG. REP. '48-'50 Dec. ¶ 67, 205 (Mo. 1952) (conspiracy to fix resale price of liquid petroleum illegal under state antitrust laws).

The requisite competition was found though plaintiff's tooth brushes were the only Nylon brushes that could be purchased, *Weco Products Co. v. Mid-City Cut Rate Drug Stores*, 2 CCH TRADE REG. REP. ¶ 7174 (Cal. Super. 1940); or plaintiff's stockings had a patented design, *Glen Raven Knitting Mills, Inc. v. Sanson Hosiery Mills Inc.*, 189 F.2d 845 (4th Cir. 1951). Competition was held to exist among copyrighted books, *Schill v. Remington Putnam* 17 A.2d 175 (Md. 1941); and among phonograph records of different compositions by different artists, *Columbia Records, Inc. v. Goody*, 278 App. Div. 401, 105 N.Y.S.2d 659 (1951), *reversing CCH TRADE REG. REP. '48-'51 Dec. ¶ 62,732* (N.Y. Sup. Ct. Special Term 1950). *But cf. Schmid, Inc. v. McKay*, 1948-1949 TRADE CASES ¶ 62509 (Okla. Dist. 1949). Moreover, one state court has interpreted "Fair" to rule out Fair Trade for a producer who did not interfere with retailers' cutting prices at will. *Schenley Distributors v. H. Hollander Co.*, 2 CCH TRADE REG. REP. ¶ 25545 (Mass. Super. 1940). See Rahl, *Resale Price Maintenance, State Action, and the Antitrust Laws: Effect of Schwegmann Brothers v. Calvert Distillers Corp.*, 46 ILL. L. REV. 349, 374-5 (1951), for discussion of the possible conflict in the statutes' dual requirement of "fair" and "free."

16. See statutory text, note 14 *supra*. Distributors combining with producers to force other dealers into Fair Trade arrangements were held to violate the Sherman Act, the Court in part resting on the rationale of the "horizontal" proviso. *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 296-7 (1945). The proviso withheld Miller-Tydings protection from retailers agreeing among themselves on price-fixing. *United States v. Greater Kansas City Retail Coal Merchants' Ass'n*, 85 F. Supp. 503 (D.C. Mo. 1949); *Cf. California Retail Grocers & Merchants Ass'n v. U.S.*, 139 F. 2d 978 (9th Cir. 1943), *cert denied*, 322 U.S. 729 (1944). Similar agreements among wholesalers and retailers were also illegal. *Pazen v. Silver Rod Stores, Inc.*, 130 N.J. Eq. 407, 22 A.2d 237 (Ct. Err. & App. 1941). And a producer could not cooperate with wholesalers and retailers to fix minimum resale prices on both distributive levels. *United States v. Bausch & Lomb Optical Co.*, 45 F. Supp. 387, 399 (S.D.N.Y. 1942), *modified*, 321 U.S. 707 (1944) ("the system . . . created not only a perpendicular system of control but, in addition, two horizontal systems, one involving competing wholesalers and the other competing retailers.").

ECONOMIC CONTEXT OF FAIR TRADE<sup>17</sup>*Pressures in the Distribution Process*

Traditionally, three distinct economic groups function within distributive channels.<sup>18</sup> Producers vie for favorable distributive outlets to the consumer.<sup>19</sup> Wholesalers perform middleman, storage, and distribution functions and sell the outputs of rival producers to retailers.<sup>20</sup> And retailers in turn compete with each other, offering as attractions to the consumer their own services and the outputs of various producers.<sup>21</sup>

Nationally advertised products are traditionally distributed with little price competition.<sup>22</sup> Producers through brand labels and advertising differentiate themselves from their competitors, and build consumer preference margins for their own wares.<sup>23</sup> Typically they merchandise through whole-

17. Consult generally MILLER at 230-66; STOCKING & WATKINS at 321-30; EDWARDS, *MAINTAINING COMPETITION* 66-73 (1949); FTC REPORT *passim*; GREYER *passim*.

18. For excellent analyses of the traditional tripartite system of distribution and the impact of new methods of selling see Fulda, *Food Distribution in the United States*, 99 U. OF PENN. L. REV. 1051 (1951); ZORN & FELDMAN at 3-27; STOCKING & WATKINS at 316-33. For a particularly embittered picture of the traditional system, consult SIMONS, *ECONOMIC POLICY FOR A FREE SOCIETY* 71 (1948): "[E]very producer must bribe merchants into pushing his product, by providing fantastic 'mark-ups,' merely because other producers are doing the same thing. Consumers must be prohibited access to wholesale markets and prices in order to protect the 'racket' of retailers whose co-operation the individual producer requires; and there follows inevitably the absurd proliferation of small retail establishments which spring up to exact on small volumes of trade the large percentage tribute existing arrangements allow to those who can classify as dealers rather than as consumers. There appears to be no significant limit . . . to the potential accumulation of economic waste."

19. "The manufacturer must be as attentive to winning their favor as to winning that of consumers through direct advertising. Especially must the price of the product be high enough to reward adequately, even generously, all those who control distributive outlets." CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 122 (5th ed. 1946) (hereinafter cited as CHAMBERLIN). See, generally, *id* at 118-23. A manufacturer's forward integration into distribution obviates this necessity. But only makers of goods that can support separate retail outlets can afford this.

20. See *e.g.*, ZORN & FELDMAN at 3-5, Fulda, *supra* note 18 at 1054-55.

21. For discussion of retailers' pricing of goods and services, consult MILLER at 246-49.

22. See note 18 *supra*; Adelman, *Effective Competition and The Antitrust Laws*, 61 HARV. L. REV. 1289, 1296-1301 (1948). Cf. *American Tobacco v. United States*, 328 U.S. 781, 804 (1945).

23. "The imperfection of competition among manufacturers rests largely upon the use of advertising to break up the market into a series of submarkets." Burns, *Anti-Trust Laws and Regulation of Price Competition*, 4 LAW & CONTEMP. PROB. 301, 306 (1937); "If one can succeed in persuading the public that his goods are really unique, obviously he becomes their only supplier." Adelman, *supra* note 21 at 1299. See generally Brown, *Advertising and the Public Interest; Legal Protection of Trade Symbols*, 57 YALE L. J. 1165 (1948). Consult CHAMBERLIN at 115-29 for a theoretical analysis of the results of competitive advertising. Cf. *American Tobacco Co. v. United States*, 328 U.S. 781, 796, 805-8 (1946) (advertising permitted three cent differential between defendants' cigarettes and minor brands.)

salers who buy in bulk at a functional discount<sup>24</sup> and resell to retailers in smaller lots. And to maintain wholesaler goodwill, manufacturers may refuse to sell at wholesale prices even to retailers able to buy in wholesale lots.<sup>25</sup> Wholesalers often act as exclusive territorial agents for a product and thus meet no price competition in that brand.<sup>26</sup> Even where many wholesalers distribute one branded product, competition concentrates on services and location rather than price.<sup>27</sup> To avoid retailer disaffection, wholesalers in turn refrain from direct sales to consumers. And a multitude of small retailers, usually weak in bargaining power, purchases stock from wholesalers at inflexible prices and sells at a percentage mark-up of cost.<sup>28</sup> In sum, price competition is meager; location, services and personal contact count.<sup>29</sup>

But mass-distribution pays. Large retail sales mean large purchases from suppliers, enabling retailers to squeeze price concessions from middlemen or producers.<sup>30</sup> And if concessions are not forthcoming, giant retailers

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24. "The seller's schedule fixes discounts from quoted price to buyers classified according to rank on the distribution ladder. Typical systems allow reductions to wholesalers, jobbers, and retailers in decreasing amounts, regardless of size of individual transaction or aggregate sales volume. A wholesaler may buy 10 units during one year. But a retailer who buys 100 units each month must pay the higher price." Rowe, *Price Discrimination, Competition and Confusion* 60 YALE L.J. 929, 932 (1951). This discount structure is a major support for the traditional wholesaler. One economist characterized it as "a vestigial remainder of the mercantilist system (as a colossal system of restraint upon trade)." SIMONS, *ECONOMIC POLICY FOR A FREE SOCIETY* 72 (1948).

25. See ZORN & FELDMAN at 6. Cf. *Great A & P Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46 (2d Cir. 1915).

26. Comment, 58 YALE L.J. 1121, 1122-3 (1949).

27. E.g., Cassady & Jones, *The Los Angeles Wholesale Grocery Structure: 1920-46: A Case Study*, 14 J. MARKETING 169, 170 (1949).

28. Cf. Hawkins, *Marketing and the Theory of Monopolistic Competition*, 4 J. MARKETING 382 (1940).

29. "In general, the smaller independent stores are *service* institutions. Since price appeal is normally not their policy, attention can be given to such things as the customer preference as to the thickness of steak, the flavor of ice cream, or the brand of cigar which he prefers." MAYNARD & BECKMAN, *PRINCIPLES OF MARKETING* 130 (4th Ed. 1946). See also GREYER at 232-3.

30. FEDERAL TRADE COMMISSION, *FINAL REPORT ON THE CHAIN STORE INVESTIGATION* 57-8 (1934). "These concessions take various forms. Where terms are secret, no problem is presented. However, some producers who maintain an open-price policy consider it advisable to conceal the extent of these concessions, in order to avoid too loud a protest from wholesalers. Special discounts take the form of divers 'allowances.' Sometimes a distributor is granted brokerage for placing his own order. Occasionally a subsidiary corporation is organized and collects brokerage for selling to its parent company. In each case, however, it is the differential itself, rather than its nominal justification which is significant." ZORN & FELDMAN at 12. See generally, *id* at 11. Cf. *United States v. Great A & P Co.*, 173 F. 2d 79, 83-7 (7th Cir. 1949).

The Robinson-Patman Anti-Price Discrimination Act, 49 STAT. 1526 (1936), 15 U.S.C. § 13 (1946) was directed at precisely this practice. See Rowe, *supra* note 24, at 929-30. For recent full discussion of the economic basis and legal effects of the statute, see *ibid*, *passim*. When an illegal price concession is granted, both seller and buyer violate the

may threaten forays into the middleman or production field.<sup>31</sup> Moreover, mass retailing permits the spreading of managerial and handling costs.<sup>32</sup> Again, minimization of incidental retail services permits additional price cuts on the retail level.<sup>33</sup> Finally, volume sales sustain expensive advertising campaigns<sup>34</sup> and permit spectacular price cuts on popular items.<sup>35</sup> Such price-cutting benefits diversified merchandisers,<sup>36</sup> using loss-leaders in one department as bait for other high-profit sales. As a result, traditional retailers face unprecedented competitive pressures.<sup>37</sup>

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Act. FTC v. Morton Salt Co., 334 U.S. 37 (1948) (seller); Automatic Canteen Co. v. FTC, 20 U.S.L. WEEK 2320 (7th Cir. Jan. 29, 1952) (buyer). Moreover, both parties may be held liable for treble damages at the instance of injured parties. See cases cited in Rowe, *supra* note 24, at 941 n.73, 958 n.198, 961 n.210.

31. For example, see Adelman's short history: "The profits of Ralston-Purina Company on sales to A & P were very large. There were only two other firms who manufactured corn flakes for private label, and it is easy to imagine that buyers may be over a barrel when there are only three sellers in the market. But A & P drew Ralston's attention to the fourth alternative of manufacturing for itself, and consequently received a cheaper price." Adelman, *The A & P case, A Study in applied Economic Theory*, 63 Q. J. ECON. 238, 254 (1949). And see *id.* at 247-48; STOCKING & WATKINS at 327-9.

32. "Perhaps the most fundamental characteristic of the corporate chains is the economy achieved (a) through mass volume and centralized management at the retail level and (b) through integration of wholesaling, retailing, and, in many cases, manufacturing operation." Fulda, *supra* note 18, at 1056 *et seq.*

33. The culmination of the limited service trend is the self-service, cash-and-carry supermarket. See ZORN & FELDMAN at 8-9.

34. Volume sellers are at a comparative advantage in advertising techniques over small individual retailers. FTC, INVESTIGATION OF CHAIN STORE ADVERTISING 48 (1934), and *passim*. This advantage is often enlarged by squeezing added advertising allowance from manufacturers. *E.g.* Fulda, *supra* note 18, at 1084-94; FTC, REPORT ON DISTRIBUTION METHODS AND COSTS Part V p. 19 (1944). However, organized small retailers have been able to counter-attack with cooperative advertising ventures. *Ibid.*

35. See notes 2 *supra*, 36 *infra*.

36. Leader selling is a function of diversification rather than size. EDWARDS, MAINTAINING COMPETITION 68 (1949). The leader is generally a widely known medium-priced item, with a fast turnover and of a type making it unprofitable for consumers to hoard it. GREYER at 199-224. It acts as an advertising medium for the retail store, drawing in customers on the basis of quick price comparisons on popular items. EDWARDS, *supra*, at 68-9; Burns, *supra* note 23, at 308. "The small concern can match the large one more readily in such tactics than in display advertising, radio advertising and various other forms of promotion." EDWARDS, *supra*, at 68. For economic analysis of the effects of leader selling, see MILLER at 249-57.

37. Small retailers often blame their heavy bankruptcy incidence on chain store competition. COVER, PROBLEMS OF SMALL BUSINESS 122-3 (TNEC Monograph No. 17, 1941). The Senate Select Committee on Small Business recently reported: "The memory of the early Nineteen Thirties and the great number of small independent concerns that were then lost to the economy directly as a result of . . . price wars is still fresh." N.Y. Times, Feb. 3, 1952, § 3, p. 9, col. 3. But "most of the failures occurred to marginal firms, parasitic in nature, which could remain in business only so long as not challenged by pressure of economic forces or of modern business methods." COVER, *supra* at 122. 4 Hearings before the Special Committee on Investigation American Retail Federation 74th Cong., 1st Sess. 261 (Rev. Print) (1936); Fulda, *supra* note 18 at 1073.



Modern distribution methods also endanger orthodox wholesalers. Retail price cutters, upsetting stable pricing patterns, may set off chain reactions leading other retailers to pressure price reductions from wholesalers.<sup>38</sup> And large retailers may integrate backward, adding middleman functions to their retail selling. Thus they may buy directly from producers, easing wholesalers from substantial markets.<sup>39</sup> Moreover, integrated retail-wholesale distributors may branch out to supply non-integrated retailers, directly usurping independent wholesalers' markets.<sup>40</sup> And integrated retailers, by partially eliminating one level of costs are further enabled to cut prices at retail,<sup>41</sup> increasing other retailers' pressure on their suppliers. Finally some middlemen, basing operations upon limited service and performing merely brokerage functions, emerge as price cutters at the wholesale level.<sup>42</sup>

38. Wholesaler reaction to these pressures varied, but many wholesalers allowed their small customers an extra 10% discount on the purchase of certain types of merchandise to aid them in meeting competition. FTC REPORT at 206-12. After legalization of Fair Trade, the discounts were withdrawn. *Ibid*, GREYER at 293.

Wholesalers were "[r]aked by the cross-fires of direct-selling manufacturers on the one flank, and direct-buying retailers on the other." COVER, *op. cit. supra* note 37, at 163. And see *id* at 161-63, 169. "Not only were these large retailers permitted to buy direct from producers; they were often able to secure more favorable terms than any wholesaler." ZORN & FELDMAN at 11. See generally, Edmunds, *In Wholesaling's Future—The Coming America*, 14 J. MARKETING 267 (1949). Wholesalers attempted counter-pressure, by boycotting producers who sold directly to chain retailers, *United States v. Southern California Wholesale Grocers Ass'n*, 7 F.2d 944 (S. D. Cal. 1925) (group boycott enjoined as violating Sherman Act); *but cf.* FTC v. Raymond Bros.-Clark Co., 263 U.S. 565 (1924) (individual wholesaler's refusal to buy upheld), or by forming "voluntary chains" of their own; or they gathered a group of retailers around themselves as guaranteed purchasers of general and private brand items. MAYNARD & BECKMAN, *op. cit. supra* note 29 at 194-201.

40. Cf. the operations of ACCO, A & P's buying subsidiary. *United States v. A & P Tea Co.*, 173 F.2d 79, 85 (7th Cir. 1949); Note, 58 YALE L. J. 969, 972 (1949).

41. For analysis of the economies of integration, see Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 29 (1949) ("When integration pays, the saving is essentially in the cost of transfer. Raw materials or supplies may be conserved. Or it may be possible to by-pass certain steps in distribution, thereby saving the cost of services no longer needed."). Further cost savings growing out of integration are explained in Spengler, *Vertical Integration*, 58 J. POL. ECON. 347 (1951). Spengler postulates that vertical integration that avoids dealing with outsiders who are monopolistically organized at any stage of distribution enables the firm to short-circuit a monopoly surcharge and thus charge a lower price to the consumer. See generally, McNair, *supra* note 10; Cassidy, *The Integrated Marketing Function and Public Welfare*, 6 J. MARKETING 252, 255-9 (1942).

42. See ZORN & FELDMAN at 22-3, 31-3, 184; FTC REPORT at 9-10. For a survey of the varied types of middlemen functioning today, see MAYNARD & BECKMAN, *op. cit. supra* note 29, at 246-8, 283-300.

See *Southern Hardware Jobbers Ass'n v. FTC*, 290 Fed. 773 (5th Cir. 1923) (hardware jobbers' association violates FTC Act by boycott of manufacturers to squeeze "irregular" jobbers from supplies); *Arkansas Wholesale Grocers Ass'n v. FTC*, 18 F.2d 866 (8th Cir. 1927) (wholesale grocers' association ordered to cease boycott of manufacturers, aimed "especially" at freezing "co-operative" wholesalers from supplies).

Mass distribution also pressures producers. Where few producers compose a market, price competition may seem unprofitable.<sup>43</sup> If their wares form a stable segment of the buyer's consumption, price reductions in such relatively inelastic markets may not spur a proportionate rise in sales.<sup>44</sup> And since even an individual producer's differentiation of his product cannot completely isolate him from his rivals' price policies,<sup>45</sup> individual price cuts tend to be followed by all. As a consequence, the individual producer's market share may be left unchanged. Because of the price reductions, however, his total returns are diminished. Therefore producers' price policies, because mutually interdependent, are geared away from price reductions dangerous to all. A pattern of inflexible pricing results. But price cuts on the wholesale or retail level jar the orderly price structure of producers. Producers may attribute price cuts anywhere in distribution channels to secret price concessions by their rivals,<sup>46</sup> and make compensating price drops to retain market shares. Moreover, mass distributors make powerful bargainers, capable of directly exacting price concessions by threats of taking their business elsewhere or of fostering their own brands.<sup>47</sup> And any concessions made not only may force down the price level of all producers, but encourage demands by other buyers for lower rates. Finally, a producer's sales to price-cutting merchants may provoke other retailers to shun his wares. Producers thus have a stake in stifling competition on the retail and wholesale levels.

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43. For economic treatments of price policies in markets dominated by a few large sellers, i.e., oligopolies, consult CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (5th ed. 1946); ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* (1933); FELLNER, *COMPETITION AMONG THE FEW* (1949). For an excellent concise analysis of the folly of price cutting by oligopolists in the cement industry, see Comment, 58 *YALE L.J.* 426, 432, 433 (1949) ("In short, price competition in this type of market becomes financial disaster."); Rowe, *supra* note 24, at 939 ("In such markets price competition is vermin, and sellers readily cooperate to stamp it out."). See generally MILLER, at 186-8 (1941); STOCKING & WATKINS at 85-131; and, on a more technical level, see STIGLER, *THE THEORY OF PRICE* 197-302 (1947); BAIN, *PRICING, DISTRIBUTION AND EMPLOYMENT* 176-221 (1948).

44. BOWMAN & BACH, *ECONOMIC ANALYSIS AND PUBLIC POLICY* 267-77 (2d ed. 1949).

45. See *American Tobacco Co. v. United States*, 328 U.S. 781, 805-6 (1946).

46. "The outstanding virtue of a system of private enterprise, . . . arises out of a kind of mutual confidence game. . . . [I]f there are few enough sellers in the market to enable each to watch all the others, the play may slow down . . . to the extent that sellers anticipate each others' reactions and become of one mind, they behave like one seller, a monopolist. Some uncertainty . . . is necessary for effective competition." Adelman, *Effective Competition and the Antitrust Laws*, 61 *HARV. L. REV.* 1289, 1299, 1329-30 (1948); see MILLER at 186-7 (1941). On "uncertainty" in the theory of oligopoly, see CHAMBERLIN, *op. cit. supra* note 19, at 51-5.

47. "A strong alert buyer, large enough so that the loss of his patronage is not a matter of indifference, constantly on the watch for a break which he can exploit by rolling up the whole price front, able to force concessions first from one then from all, and followed by other buyers, can collapse a structure of control or keep it from ever coming into existence." Adelman, *supra* note 46, at 1300, 1331-2; STOCKING & WATKINS at 328. See note 31 *supra*.

*Market Consequences of Fair Trade*

Effective resale price maintenance<sup>48</sup> insulates traditional distribution methods and stable pricing from competitive attack.<sup>49</sup> Retailers are mutually relieved from fears of price competition on the retail level. With retailers' price competition stifled, pressure on wholesalers to cut costs and prices ebbs.<sup>50</sup> And resale price restrictions restrain potential price cutters on the wholesale level. For producers, effective Fair Trade cements certainty of their rivals' price policies and thus seals potential cracks in the mutually beneficial high price wall.<sup>51</sup> Moreover, as distributors themselves are freed from price competition, their direct pressure on producers relaxes in turn. And the demise of loss-leader merchandising solves another class of manufacturers' problems.

But benefits to small retailers are not unmixed. Mass retailers, unable to cut prices on nationally advertised products, may conduct advertising appeals<sup>52</sup> to maintain volumes or push their own private low price brands.<sup>53</sup> These techniques are beyond small retailers' reach. Moreover, guaranteed

48. Fair Trade can only flourish where it is superimposed upon a generally non-competitive production and distribution arrangement. (1) "Because a single price fixed commodity is subject to the inroads of competitors fixing lower prices, a manufacturer seldom will establish and enforce a system of vertical prices unless he knows that competing manufacturers are likewise fixing and enforcing prices at known levels." FTC REPORT at lxii; MILLER at 259-60; GREYER at 276; EDWARDS, *MAINTAINING COMPETITION* 276 (1949). (2) Small retailers must be well organized to police Fair Trade prices and whip recalcitrants into line, FTC REPORT at 309; and to push Fair Traded items to make up volume they may lose in chain stores. *Id.* at 289, 325. See *Id.* at 257, GREYER at 272. (3) Consumer price consciousness must not be too great or consumers will shift to non-Fair Traded brands. In the drug trade, where resale price maintenance has met with the most success, "price appeal is often distinctly secondary . . . the average consumer is wedded to her favorite brand of face powder by a bond stronger than price." ZORN & FELDMAN at 291, 292. Compare FTC REPORT IV, 298.

49. "The essence of resale price maintenance is control of price competition." FTC REPORT at lxi, see 704; GREYER at 277; MILLER at 261; EDWARDS, *MAINTAINING COMPETITION* 71 (1949).

50. The 10% extra discount allowed by many drug wholesalers to small retailers to aid them in meeting competition of chains, note 38 *supra*, was discontinued after Fair Trade became effective. FTC REPORT at 205-12. Of course retail druggists did not approve of this "discrimination." *Id.* at 209-11.

51. See note 46 *supra*. GREYER at 288; STOCKING & WATKINS at 322-4. For theoretical analysis of manufacturer calculations in fixing Fair Trade prices, see Phillips, *Some Theoretical Considerations Regarding Fair Trade Laws*, 3 J. MARKETING 242 (1938); Hawkins, *Further Theoretical Considerations Regarding Fair Trade Laws*, 4 J. MARKETING 126 (1939).

52. Even with Fair Trade, "retailers [are] still free to compete in service, credit, advertising, sales effort, and window and counter display. All these may be just as ruinous forms of competition as price cutting. . . [I]n the case of some of these . . . forms of competition, the balance of advantage would seem often to lie with the large dealers and chains." MILLER at 261. See Schachtman, *Resale Price Maintenance and the Fair Trade Laws*, 11 U. OF PITTS. L. REV. 562, 579-81 (1950).

53. See note 58 *infra*.

high retail markups lure new outlets into distribution of Fair Traded items,<sup>54</sup> thus paring all retailers' market shares. And, since wholesale prices are fixed, Fair Trade blocks retailer receipt of price advantages of modernized distribution methods.

Fair Trade may also engender new problems for producers. Effective enforcement requires a distributor organization ready to police and report price cutters for appropriate action by the manufacturer.<sup>55</sup> But retailers may utilize this newly acquired organized power for bludgeoning producers to grant greater retail percentage markups over invoice cost.<sup>56</sup> Producers may comply by either lowering invoice cost to retailers or raising the Fair Trade contracts' minimum retail price. Either course gives retailers a greater share of retail revenues.<sup>57</sup> So long as raised retail prices do not reduce volume proportionately, retailers will gain. Also, Fair Trade induces the growth of large retailers' private brands. When giant distributors can no longer cut prices on producers' advertised brands, they may push their own private brands instead.<sup>58</sup> In this way, they set a competitive ceiling on fixed resale prices, or, by underselling fixed-price producers' brands, may actually usurp their share of the market.<sup>59</sup>

Finally, Fair Trade hampers successful expansion by small producers. Price-cutting may be an effective wedge for a producer breaking into a new market dominated by large, established rivals. But existing distributors are hostile to intruders' price-cut products.<sup>60</sup> And unlike the integrated

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54. "[K]nown price levels and guaranteed margins are strong magnets for new enterprises." GREYER at 254-5, 270-1; MILLER at 262; EDWARDS, MAINTAINING COMPETITION 71 (1949).

55. FTC REPORT at 166-241.

56. Retail druggists organized to demand a standard 50% markup. FTC REPORT at 125-37; the previous attempt at this by a retail druggist organization resulted in an injunction under the Sherman Act. *Id.* at 36-8. And *cf.* *United States v. Frankfort Distilleries*, 324 U.S. 293 (1945) (liquor distributors' organization to compel producers to adopt Fair Trade pricing held violative of Sherman Act).

57. "It need not follow that increases in realized retail margins under resale price control be entirely at the expense of the consumer, for they may come out of the margins of manufacturers and wholesalers. . . ." GREYER at 310-11.

58. The fear of just this prompted food trade producers to set extremely low minimum resale prices. See note 59 *infra*; GREYER at 273.

59. Food manufacturers in fair trading their products tended to set prices at the level of chain store prices. "This course was adopted to avoid, so far as possible, placing their price-maintained brands at a disadvantage in price competition with non-price-maintained brands, antagonizing large distributors and fostering the development by them of private brands." FTC REPORT at 297. "Manufacturers were extremely careful not to establish minimum prices that would provide an opening for a competitor to build up sales volume at their expense. *Id.* at 325 259-63.

60. "These smaller manufacturers . . . face something of a dilemma when they consider resale price maintenance. If they do not attempt it they may not be able to obtain personalized selling attention from the majority of dealers. If they do try it . . . their larger competitors might then follow them into programs of price control and the basis of their differential advantage would be lost." GREYER at 276, 280.

Ironically, since these are the people most anxious to foster Fair Trade, wholesalers may be enabled to foster private brands as a result of Fair Trade. Absent resale price

distributor venturing into private brand production, new entrants must begin to cultivate a marketing system of their own. National advertising, the other effective method of entering markets, may be too costly.<sup>61</sup> Consequently small manufacturers' market shares may be frozen, or expanded only by means of captive production for giant retailers.

#### SCHWEGMANN AND ITS AFTERMATH

##### *The Schwegmann Case*

*Schwegmann Brothers v. Calvert Distillers Corp.*<sup>62</sup> came before the Supreme Court in 1951. It arose in a factual setting typical for Fair Trade cases. Calvert and Seagram, manufacturer-distributors of nationally advertised whiskeys, sold to Louisiana wholesalers.<sup>63</sup> The wholesalers in turn sold to retailers such as Schwegmann Brothers.<sup>64</sup> Calvert and Seagram maintained Fair Trade pricing on their wares and had signed over 100 retailers to the program.<sup>65</sup> Schwegmann was a non-signer, undercutting Fair Trade prices.<sup>66</sup> Calvert and Seagram brought suit in Federal District Court to enjoin Schwegmann's practices.<sup>67</sup> Schwegmann urged in defense that the use of non-signer clauses to bind sellers of goods in interstate commerce violated the Sherman Act.<sup>68</sup> The lower courts rejected Schwegmann's defense and granted injunctions.<sup>69</sup>

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maintenance, wholesalers' private, little known wares could not compete with price cut national brands. But resale price maintenance may invite wholesaler forays into production for their established distribution channels offering high markup but low priced items for retailers. *Id.* at 293.

61. STOCKING & WATKINS at 319.

62. 341 U.S. 384 (1951). The litigants in *Schwegmann* occupied the same distributive roles as the *Old Dearborn* litigants, note 12 *supra*. For an excellent legal analysis of the *Schwegmann* Case, see Rahl, *Resale Price Maintenance, State Action, and the Antitrust Laws*, 46 ILL. L. REV. 349 (1951). See also Rose, *Resale Price Maintenance*, 3 VAND. L. REV. 24 (1949); Schachtman, *Resale Price Maintenance and the Fair Trade Laws*, 11 U. OF PITT. L. REV. 562 (1950); Comments: 36 CORNELL L. Q. 781 (1951); 64 HARV. L. REV. 1327 (1951); 18 U. OF CHI. L. REV. 369 (1951).

63. 341 U.S. 384, 385.

64. *Ibid.*

65. *Ibid.*

66. *Ibid.*

67. *Id.* at 385-6. District Court opinion at CCH TRADE REG. REP. '48-'51 DEC. ¶62,641 (E.D. La. 1950).

68. Schwegmann Brothers alleged that:

"The plaintiff's course of conduct in using contracts with certain Louisiana retailers as a basis for fixing the prices of non-contracting Louisiana retailers violates the Sherman Anti-Trust Act...[plaintiff's]...course of conduct in attempting to fix resale prices of non-contracting retailers in Louisiana is an integral part of an integrated price-fixing scheme of transactions affecting interstate commerce depending for its success upon activity which affects interstate commerce." 341 U.S. 384 (1951).

Record on Appeal p. 19.

69. *Schwegmann Brothers v. Calvert Distillers Corp., Schwegmann Brothers v. Seagram Distillers Corp.*, 184 F.2d 11 (5th Cir. 1950). "[I]n comprehensively and com-

Before the Supreme Court, however, Schwegmann was successful. The majority found an "interstate marketing agreement" to fix prices, illegal *per se* under well worn precedent.<sup>70</sup> And state legislation could not give immunity to the scheme, absent approval by Congress.<sup>71</sup> Miller-Tydings, according to the Court, did not immunize non-signer clauses from the antitrust law; Miller-Tydings sanctioned only "consensual agreement."<sup>72</sup> But Calvert's coercion of non-signers was "price fixing by compulsion,"<sup>73</sup> violating "the spirit" of the Miller-Tydings proviso withholding protection from horizontal price fixing.<sup>74</sup> In the face of a vigorous dissent, the majority felt that Miller-Tydings legislative history supported their construction.<sup>75</sup>

The reasoning in *Schwegmann* is unassailable. The Court started with Miller-Tydings, a federal act which did not "turn over to the states the handling of the whole problem of resale price maintenance."<sup>76</sup> The Sherman Act pronounced basic congressional policy for interstate distribution of goods:<sup>77</sup> Miller-Tydings granted only "a limited immunity" from this policy.<sup>78</sup> And

pletely removing from the prohibitions of the Sherman Act *price maintenance contracts which are valid according to the law of a state* the amendment removed every prohibition from or impediment in the way of, the enactment by the states of Fair Trade laws, binding alike upon signers and non-signers. . . . This being so, it is wholly immaterial whether the members of the Congress as a whole or particular members . . . did or did not have in mind . . . the specific intent that the amendment should be effective as well against non-signers as against signers." *Id.* at 15.

70. 341 U.S. 384, 386. The cases cited were *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (program to stabilize price floor); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951) (maximum price fixing); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (resale price maintenance).

71. "The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme." 341 U.S. 384, 386.

72. *Id.* at 388.

73. *Ibid.*

74. "[W]hen retailers are forced to abandon price competition, they are forced into a compact in violation of the spirit of the proviso which forbids 'horizontal' price fixing." *Id.* at 389.

75. *Id.* at 390-95. Justices Jackson and Minton concurred in the result but objected strenuously to the detailed examination by the court of legislative history. "[A]side from a few offices in large cities, the materials of legislative history are not available to the lawyer." *Id.* at 396. The language of Miller-Tydings was sufficient to reach the result. *Id.* at 394.

Justice Frankfurter dissented and was joined by Justices Black and Burton. They read the legislative history of Miller-Tydings to validate nonsigner clauses, *id.* at 397-411.

76. *Id.* at 388.

77. *Id.* at 395. "We could conclude that Congress carved out the vast exception now claimed only if we were willing to assume that it took a devious route and yet failed to make its purpose plain." *Ibid.*

78. *Id.* at 388. For an example of this limited immunity, see *United States v. Univis Lens Co.*, 316 U.S. 241 (1942) (producers may not impose resale restrictions when distributors alter the product; here distributors ground lenses from blanks furnished by the producer). But see *Guerlain, Inc. v. Woolworth Co.*, 297 N.Y. 11, 74 N.E. 2d 217 (1947) (rebottling perfume into smaller units not held sufficient change in product).

*Schwegmann* affirms that any marketing arrangement in *violation* of the Sherman Act, not specifically immunized by Congress, remains illegal and unenforceable.

But the Supreme Court stopped short of the ultimate of its lethal logic. When a producer by contract vertically fixes identical prices with more than one distributor, the market effects are no different from a horizontal price fixing scheme by the distributors themselves.<sup>79</sup> And horizontal price-fixing, expressly excluded from Miller-Tydings protection, squarely violates the Sherman Act.<sup>80</sup> Since, broadly read, the "horizontal" proviso of Miller-Tydings could not shelter any effective resale price maintenance from Sherman Act *per se* illegality, the Miller-Tydings "horizontal" proviso would disembowel Miller-Tydings itself. The Supreme Court's opinion, however, left "vertical" resale price fixing doctrinally unscathed.

#### *Other State Practices*

Nevertheless the Court's reasoning probably destroys two similar state Fair Trade practices. Some state statutes, going beyond Miller-Tydings' literal protection, allow producers to fix absolute—not merely minimum—resale prices.<sup>81</sup> But absolute prices are at the same time minimum and maximum. Since the Supreme Court in 1951 held maximum price fixing illegal *per se* under Section 1 of the Sherman Act,<sup>82</sup> absolute price-fixing agreements sanctioned by state law seem illegal as antitrust violations outside the Miller-Tydings shield. Other state Fair Trade laws do not expressly limit statutory price-fixing authority to producers of branded goods. Consequently some state courts permit wholesalers to set retailers' resale prices even without producers' consent.<sup>83</sup> Price setting by anyone but the owner of the brand

79. This was early recognized by the Supreme Court. *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911): The producer "can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other." *Id.* at 403. And *cf.* Shulman, *The Fair Trade Acts and the Law of Restrictive Agreements Affecting Chattels*, 49 YALE L. J. 607, 621-2 (1940).

80. See cases cited in note 70 *supra*.

81. The older statutes provide that the "buyer will not resell such commodity except at the price stipulated by the vendor." (Emphasis added.) *E.g.*, CALIF. BUSINESS AND PROFESSIONS CODE § 16902(a)(1) (1951). The newer statutes specify sales at "less than the minimum price." *E.g.*, CONN. GEN. STATS. § 6709 (1949). See 2 CCH TRADE REG. REP. ¶ 7242.

82. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951).

83. *Schenley Products Company v. Franklin Stores Co.*, 124 N.J. Eq. 100, 199 Atl. 402 (App. Ct. 1938) (wholesaler acting on his own fixed minimum resale prices. "[T]o assert that the contract must be made by or on behalf of the owner of the trade-mark or brand . . . is to impart into the statute that which is unnecessary to its operation."). "The other party to the contract, the vendor, need not necessarily be the producer of the commodity, or the owner of the trademark, trade name or brand thereof. There need be no contract to which a wholesaler is a party. The statute is sufficiently broad to include any contract made by any owner with any vendee." *Parrott & Co. v. Somerset House Inc.*, 2 CCH TRADE REG. REP. ¶ 7176 (Cal. Super. 1937).

The later statutes, following the NARD model, specifically limit the power to establish

may fall outside Miller-Tydings literal protection,<sup>84</sup> and thus violate the Sherman Act under the doctrine of *Dr. Miles Medical Co. v. John D. Park and Sons*, decided by the Supreme Court in 1911.<sup>85</sup> And when one wholesaler, even with the producer's authorization, fixes resale prices on two or more competing products sold by him, he factually achieves the "horizontal" effects<sup>86</sup> outlawed by *Schwegmann* logic.

### "Intrastate" Resale Price Maintenance

In any event, however, *Schwegmann's* effects can coextend only with the Sherman Act's reach into local commerce. Where a producer signs Fair Trade contracts with retailers in other states and himself enforces observance of the fixed prices, the price-fixed goods move in interstate commerce. Interstate effects are obvious and clearly within the interstate commerce scope of the Sherman Act.<sup>87</sup> And a break in the flow of goods, by layover in local wholesale houses from which sales to retailers are made, does not alter the legal consequences. Courts thus have followed *Schwegmann's* lead by denying enforcement against non-signers because of the "interstate character" of the producers' commerce.<sup>88</sup> Even when the suing producer contracts with distri-

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resale prices to the owner of the trade-mark, brand or name used in connection with such commodity or by a distributor specifically authorized to establish such price by the owner." CONN. GEN. STAT. § 6711 (1949). See 2 CCH TRADE REG. REP. ¶ 7178. That an exclusive territory wholesaler becomes automatically an "authorized" distributor, see *Continental Distilling Company v. Famous Wines and Liquors*, 274 App. Div. 713, 80 N.Y.S. 2d 62 (1st Dep't 1948).

84. See statutory text, note 14 *supra*.

85. 220 U.S. 373 (1911).

86. See discussions in Notes, 52 HARV. L. REV. 284, 288 (1938); 36 CORN. L. Q. 781, 793 (1951). The effect of permitting wholesalers to fix prices on competing lines will vary with the strength of the competition the wholesaler meets within his territory. If he is an exclusive territorial agent on all lines he can dictate retail prices on competing products. But to the extent that competing wholesalers exist, the wholesaler attempting to fix resale prices may be blocked by competitive activity on their part.

87. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); *Sunbeam Corp. v. Civil Service Employees Co-operative Ass'n*, 192 F.2d 572 (3d Cir. 1951), *cert. denied*, 20 U.S.L. WEEK 3178 (U.S. Jan. 3, 1952); *Sunbeam Corp. v. Wentling*, 192 F. 2d 7 (3d Cir. 1951); *Lambert Pharmacal Co. v. Roberts*, 233 P. 2d 258 (Ore. 1951); *Seagram-Distillers Corp. v. Ben Greene, Inc.*, 54 So.2d 235 (Fla. 1951); *Calvert Distillers' Corp. v. Sachs*, 48 N.W. 2d 531 (Minn. 1951).

88. See note 87 *supra*. All cases involved layovers of the goods in local warehouses. In *Sunbeam Corp. v. Civil Service Employees Co-operative Ass'n*, 192 F.2d 572 (3d Cir. 1951), *cert. denied*, 20 U.S.L. WEEK 317A (U.S. Jan. 3, 1952) plaintiff argued "[T]hat even if the goods come from without the state, when they have come to rest here they are no longer in interstate commerce. . . ." But for the court, "[o]ne of the troubles with this argument [was] that it is directly contrary to the result reached by the Supreme Court in *Schwegmann*. . . ." 192 F.2d 572, 573. "It is the interstate character of *Sunbeam's* commerce that is crucial and governing. . . ." *Ibid.* See also *Standard Oil Co. v. FTC*, 340 U.S. 231, 237-8 (1951), where the Supreme Court disposed of a similar argument, under the apparently narrower interstate reach of the Robinson-Patman Act.



butors in his own state, courts have found sufficient interstate effects to invoke the Sherman Act, since the producer had shipped goods to other states as well.<sup>89</sup> Success in local resale price fixing was held to affect price policies in other states, with the requisite effects on interstate commerce.<sup>90</sup> And despite early contrary belief,<sup>91</sup> the Sherman Act today may well reach producers whose entire output is locally sold. Fixed local prices inevitably influence the price-fixing producer's out-of-state competitors' price policies for the local market.<sup>92</sup> And a local price fixing arrangement necessarily determines the producer's flow of purchases from other states.<sup>93</sup> When wholesalers set the resale prices, independently or at the producer's direction, the Sherman Act under similar reasoning should reach them as well.

Where resale price-fixing contracts consummated by producers are left to enforcement by local retailers, decisions have been inconsistent. Although economic consequences to Fair Trade producers are unrelated to the distributive function of the enforcers, some courts have permitted local retailers to enforce Fair Trade against local price-cutting non-signers, on the simple ground that no interstate commerce was involved.<sup>94</sup> But even here one case apparently limited local retailers' enforcement against non-signers to instances where the contracting manufacturer operated within the local state, though he also sold to other states.<sup>95</sup>

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89. *Cal-Dak Company v. Sav-On Drugs Inc.*, CCH TRADE REG. REP. '48-'51 Dec. ¶ 62,904 (Cal. Super. 1951); *Bulova Watch Co. Inc. v. S. Klein On the Square, Inc.*, 199 Misc. 818, 105 N.Y.S. 2d 175 (Sup. Ct. 1951). Cf. *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.*, CCH TRADE REG. REP. '48-'49 Dec. ¶ 62,905 (Mich. Cir. Ct. 1951) (all commerce involved assumed to be intrastate, but non-signer clause invalidated on due process grounds), compare note 12 *supra*.

90. "In the case at bar the success or failure of plaintiff's sales in California unquestionably affect plaintiff's ability to continue to sell its products in other states and therefore affect interstate commerce." *Cal-Dak Company v. Sav-On Drugs Inc.*, CCH TRADE REG. REP. '48-'51 Dec. ¶ 62,904 at page 64,739 (Cal. Super. 1951).

91. See ZORN & FELDMAN at 309-10; Martin, *The Fair Trade Act*, 5 FORD. L. REV. 50, 56-7 (1936). Notes 36 COL. L. REV. 293, 303-5 (1936); 6 GEO. WASH. L. REV. 110, 114 (1937).

92. See notes 96, 97 *infra*. Fair Trade price fixing by local producers undoubtedly affects interstate commerce under economic analysis. If high prices are fixed, non-Fair-Traded items will flow into the state from outside to grasp the competitive advantage. If low prices are fixed, a greater volume of local production will be sold.

93. Cf. *Standard Oil Co. of Calif. v. United States*, 337 U.S. 293, 314-15 (1949); see Rahl, *Resale Price Maintenance, State Action, and the Anti-trust Laws*, 46 ILL. L. REV. 349, 381 (1951).

94. *Rothbaum v. R. H. Macy and Co., Inc.*, 199 Misc. 890, 105 N.Y.S. 2d 638 (Sup. Ct. 1951) (local retailer permitted to enjoin non-signer Macy's from selling below Fair Trade price on items produced in New York; business involved held "intrastate in character"); *Jacobson Bros. v. Exquisite Footwear Inc.*, 199 Misc. 820, 105 N.Y.S. 2d 520 (Sup. Ct. 1951).

95. *Rothbaum v. R. H. Macy and Co., Inc.*, CCH TRADE REG. REP. '48-'49 Dec. ¶ 62,844 (N.Y. Sup. Ct. 1951) (motion for contempt by violating injunction dismissed

Since Congress in passing the Sherman Act "left no area of its constitutional power unoccupied,"<sup>96</sup> geographical limits for use of non-signer and other state Fair Trade provisions should be set by the outermost fringes of the Commerce Clause. Any marketing arrangement *affecting* interstate commerce should be challengeable under the Sherman Act.<sup>97</sup> Because the anti-trust laws aim to establish a nationwide uniform rule of economic conduct, economic *effects* upon interstate commerce must guide decisions.

*Resale Price Maintenance Enforcement by Refusals to Sell*<sup>98</sup>

Although a producer's freezing of price-cutting non-signers from supplies could enforce Fair Trade pricing, refusals to sell are subject to economic and legal risks. A monopolist producer can effectively withhold supplies.<sup>99</sup> And while organized small producers may attain the same result, individual producers' isolated refusals to sell may lose markets to competitors.<sup>100</sup> Moreover, many producers cannot afford to isolate themselves from large mass distribution outlets.<sup>101</sup> And refusals to deal are open to antitrust attack.

Individual producers' refusal to sell is most likely to escape antitrust prosecution. Where not held part of an attempt to monopolize,<sup>102</sup> refusals by

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because of plaintiff's failure to show that the price cut articles were "manufactured, produced and sold to plaintiff and defendant within the State of New York"; though the court had "the distinct impression that the defendant has thumbed its corporate nose at the order.").

96. *United States v. Frankfort Distilleries*, 324 U.S. 293, 298 (1945). Cf. *Apex Hosiery v. Leader*, 310 U.S. 469, 495 (1940); *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 435 (1932).

97. "[G]iven a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms..." *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 234 (1948) (California refiners held to violate Sherman Act by combining to rig purchasing of California-grown beets which they refined into sugar and then moved into interstate commerce in competition with other sugar). The reach of *Mandeville Islands* into local commerce is apparent from its frequent citation of *Wickard v. Filburn*, 317 U.S. 111 (1942) (regulation of farmer's production of wheat for personal consumption held within congressional power under the Commerce Clause. "[A]ctivities may be regulated where no part of the product is intended for interstate commerce." *Id.* at 120. "Substantial economic effects" the ultimate test, *id.* at 125).

98. See Comment, *Refusals to Sell and Public Control of Competition*, 58 YALE L. J. 1121 (1949); Timberg, *The Rights of Customer-Seller Selection*, CCH ANTITRUST LAW SYMPOSIUM 151 (1951).

99. See Comment, 58 YALE L. J. 1121 (1949).

100. *Id.* at 1124; STOCKING & WATKINS at 327-28.

101. STOCKING & WATKINS at 328-30.

102. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (refusal by sole newspaper in community to accept advertising from local radio station advertisers held attempt to monopolize); *Eastman Kodak Co. of N.Y. v. Southern Photo Materials*, 273

individual producers may not incur illegality; in fact the right of customer selection is expressly guaranteed in the Clayton Act.<sup>103</sup> The *Colgate* case<sup>104</sup> represents the general rule, exempting from antitrust illegality individual refusals to sell, even when made for the purpose of securing adherence to the producers "suggested" resale prices. But the Supreme Court's subsequent *Beech-Nut* decision<sup>105</sup> cut down *Colgate's* exemption, by outlawing as unfair methods of competition a series of devices most effective for preventing retailers from straying from producer-dictated resale prices.<sup>106</sup> And *Bausch & Lomb*,<sup>107</sup> decided by the Court in 1944, apparently limited *Colgate's* protection of boycott enforcement of resale price maintenance to systems based on distributor's "mere acquiescence," and not requiring their active cooperation<sup>108</sup>—such as recommending cooperative "ethical" retailers or ferreting out price cutters. Thus *Beech-Nut* and its sequels were assumed to cripple *Colgate*,<sup>109</sup> and enforceable non-signer Fair Trade delayed renewed judicial test.

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U.S. 359 (1927) (refusal to supply retailer after acquisition of competing retail outlet held attempt to monopolize); *United States v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (D. Minn. 1945) (manufacturer's refusal to supply distributor who underbid him on government contract held attempt to monopolize); Cf. *United States v. International Salt Co.* 332 U.S. 392 (1947) (manufacturer's tie-in sales held violation of § 3 of Clayton Act).

103. "[N]othing contained in...this title shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1946).

104. *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

"In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell." *Id.* at 307.

105. *FTC v. Beechnut Packing Co.*, 257 U.S. 441 (1922) ("[A] trader is not guilty of violating [the Sherman Act] who simply refuses to sell to others,... He may not... go beyond the exercise of his right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade."). *Id.* at 452.

106. The practices outlawed by the Supreme Court were:

(1) receiving information from distributors as to the identity of price cutters; (2) maintaining blacklists of price cutters; (3) employing agents to gather information about price cutters; (4) utilizing symbols and tracers to track the flow of goods to price cutters; (5) utilizing any cooperative means to enforce resale prices. *Id.* at 455-56.

107. *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944).

108. *Id.* at 721-23.

109. See Comment, 58 YALE L. J. 1121, 1128-29 (1949).

In oral argument before the Supreme Court in the *Standard Oil (Indiana)* case, where the FTC had incongruously relied on the *Colgate* case, Justice Frankfurter thought that case "rather under a cloud." 18 U.S.L. WEEK 3211 (Jan. 17, 1950). For full discussion, see Rowe, note 24 *supra* at 942-45, 965-72.

*Schwegmann's* holding requires resurrection of *Colgate* for legal Fair Trade enforcement by refusals to supply price-cutters; the rebirth has already begun. The Supreme Court's recent dictum in *Kiefer-Stewart v. Seagram and Sons*<sup>110</sup> sets the pace. Seagram and Calvert, though under joint control, were found guilty of conspiring to enforce, by refusal to sell, maximum resale prices.<sup>111</sup> But the Court significantly went on to add that "Seagram and Calvert, acting individually, perhaps might have refused to deal."<sup>112</sup> The Second Circuit in *Adams-Mitchell Co. v. Cambridge Distributing Co.*<sup>113</sup> apparently took the hint. There a wholesaler contracted to buy foreign whiskeys from a distributor, on condition that the distributor maintain resale prices. Upon the distributor's failure to maintain prices the court permitted the wholesaler to rescind, though the distributor claimed that antitrust law voided the resale price maintenance stipulation in the contract. The Second Circuit's holding that Miller-Tydings legalized resale price maintenance on imported products<sup>114</sup> could have fully disposed of the case. But the court went on (though *Schwegmann* had been decided ten days before) to advise<sup>115</sup> of "legitimate means of price maintenance in spite of . . . the Sherman Act . . . such [as] . . . a refusal to sell in the future to those who had not maintained a suggested price e.g., *United States v. Colgate & Co.* . . ."<sup>116</sup> And it distinguished *Kiefer-Stewart* because there "competitors agreed on a price to be fixed."<sup>117</sup> Again, in the present term, the Supreme Court in *Lorain Journal Co. v. United States* specifically cited *Colgate* with approval,<sup>118</sup> though carefully distinguishing it from the facts at issue.<sup>119</sup>

A more recent lower court opinion, *Cat's Paw Rubber Co., Inc., v. Barlo Leather and Findings Co., Inc.*<sup>120</sup> apparently adds to *Colgate* a further twist. Improving on *Colgate's* system, *Cat's Paw* by contract also bound its distributors not to sell to non-signers. When defendant non-signer purchased *Cat's Paw* products from a contracting distributor, *Cat's Paw* sued for inducing

110. 340 U.S. 211 (1951).

111. *Id.* at 215.

112. *Id.* at 214.

113. 189 F.2d 913 (2d Cir. 1951).

114. *Id.* at 916. The Wilson Tariff Act of 1894, 28 STAT. 570 (1894), 15 U.S.C. § 8 *et seq.* (1946) mirroring section 1 of the Sherman Act attempts to destroy restraints of trade in imports into the United States. Miller-Tydings, which mentions the Sherman and FTC Acts specifically, makes no mention of the Wilson Act. The Court read the amendment into the Tariff Act. 189 F.2d 913, 916. At this point the agreement between plaintiff and defendant became enforceable, and the court need have gone no further.

115. Judge Frank in dissent charged his colleagues with setting a precedent that "breathes new life into the remains of the decrepit doctrine of *United States v. Colgate and Co.* . . ." *Id.* at 917.

116. *Id.* at 916.

117. *Ibid.*

118. 342 U.S. 143, 155 (1951).

119. *Ibid.*

120. CCH TRADE REG. REP. '48-'51 DEC. ¶ 62,949 (S.D. N.Y. 1951).

breach of the Fair Trade contract provision. The court, without citing anti-trust precedent, awarded damages to plaintiff, holding *Schwegmann* inapplicable.<sup>121</sup>

But *Cat's Paw* squarely treads on prior cases. In 1911, on practically identical facts the Supreme Court's *Dr. Miles* decision<sup>122</sup> denied judicial protection to a resale-price fixing manufacturer in his suit against a non-signer who bought from Miles' distributors contractually barred from non-signer sales. Although Miller-Tydings legalized contractual resale price maintenance, found by *Dr. Miles* to be in restraint of trade and thus violating the Sherman Act, Congress probably did not thereby intend to sanction the entire enforcement system condemned in *Dr. Miles*. Since *Beech-Nut* and *Bausch & Lomb* outlaw producers' tight policing, alone or in cooperation with middlemen, of straying retailers, a producer's action in contractually forcing his distributors to assume the policing function through refusals to sell should be doubly bad. And by enforcing the refusal to sell contracts, courts themselves actually effectuate the policing arrangement.

Moreover, since Miller-Tydings shields nothing but vertical resale price maintenance contracts,<sup>123</sup> a contractual vertical integration walling off competitors from supplies could be held illegal under recent Sherman Act doctrines as unreasonably narrowing the market for the distribution of the contracting producer's goods.<sup>124</sup> And when producer and distributor agree to freeze out all non-signers on the distributive level, the competitors of the contracting distributors are coerced to sell at the Fair Trade price or not at all. Since some distributors thus must abandon competition for the benefit of others, the "horizontal compulsion" banned by *Schwegmann* is achieved by a circuitous route. And when a series of distributors identically contracts with the producer to bind him from selling to their competitors, their parallel action may give rise to an inference of conspiracy on their part.<sup>125</sup>

Recent expansion of Sherman Act conspiracy doctrines<sup>126</sup> may effectively thwart producers' attempts to stabilize resale prices through refusals to deal. Concerted boycotts by powerful groups occupying strategic market sectors

121. *Ibid.* Cf. *Sunbeam Corp. v. Nossoff*, CCH TRADE REG. REP. '48-'51 Dec. ¶ 62,943 (Cal. Super. 1951) (damage award and permanent injunction for breach of Fair Trade agreement; no examination into legality of the contract nor citation of legal precedent). All state Fair Trade statutes authorize contracts stipulating for refusals to sell to non-signers. *E.g.*, CONN. GEN. STAT. § 6709 (1949); CALIF. BUSINESS AND PROFESSIONS CODE, § 16902 (1950).

122. 220 U.S. 373 (1911).

123. *Schwegmann Brothers v. Calvert Distillers Corp.* 341 U.S. 384 (1951).

124. *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); cf. *Standard Oil of Calif. v. United States*, 337 U.S. 293 (1949).

125. See text discussion at pages 401-3 *infra*.

126. See, generally, Comment, *Conscious Parallelism—Fact or Fancy*, 3 STAN. L. REV. 679 (1951); Note, *Are Two or More Persons Necessary to Have a Conspiracy under Section 1 of the Sherman Act?* 43 ILL. L. REV. 551 (1948); cf. Kittelle & Lamb, *The Implied Conspiracy Doctrine and Delivered Pricing*, 15 LAW & CONTEMP. PROB. 227 (1950).

have long been held illegal under Section 1 of the Sherman Act.<sup>127</sup> And the Supreme Court has struck down an organized retailer group's refusal to buy, aimed at forcing the producer to institute Fair Trade pricing.<sup>128</sup> Conversely, independent producers' organized boycott to compel distributors to toe the resale price line probably could not stand. The Supreme Court in fact has branded as an illegal "conspiracy" two corporate affiliates' intramural refusal to deal with distributors not adhering to the sellers' dictated price policy.<sup>129</sup> From this "bathtub conspiracy" concept,<sup>130</sup> only a short leap in logic can condemn as an illegal conspiracy, among members of the board of directors, even a single corporation's refusal to deal.<sup>131</sup>

Finally, a single producer with little power in the market cannot benefit long from his refusal to deal unless his competitors, too, refrain from sales. Therefore courts may look beyond the individual refusal, examine the reaction of business competitors who refuse to sell, and infer from the "conscious parallel" action of them all a conspiracy<sup>132</sup> to boycott, violating the Sherman

127. *Fashion Originators Guild v. FTC*, 312 U.S. 457 (1941); *United States v. Frankfort Distilleries*, 324 U.S. 293 (1945); *Eastern States Retail Lumber Dealers Ass'n v. United States*, 234 U.S. 600 (1914). Cf. *Associated Press v. United States* 326 U.S. 1 (1945). See generally Comment, 58 YALE L. J. 1121 (1949); Kirkpatrick, *Commercial Boycotts as per se Violations of the Sherman Act*, 10 GEO. WASH. L. REV. 302, 387 (1942).

128. *United States v. Frankfort Distilleries*, 324 U.S. 293 (1945).

129. *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211 (1951).

130. Aside from *Kiefer-Stewart*, the intramural conspiracy concept, fitting illegal activity by corporations under single central control into the Sherman Act § 1 combination requirement, has recently been used in *United States v. General Motors Corp.*, 121 F.2d 376 (7th Cir. 1941) ("conspiracy" between GM and its wholly-owned financing subsidiary); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947) ("conspiracy" between affiliated corporations); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948) ("conspiracy" among parent and 5 subsidiary corporations).

131. "The complaint alleged that *the corporation together with four of its officials*, was engaging in a *combination and conspiracy* in restraint of interstate commerce in violation of § 1 of the Sherman Antitrust Act, and in a *combination and conspiracy* to monopolize such commerce in violation of § 2..." *Lorain Journal Co. v. United States*, 342 U.S. 143, 145 (1951) (emphasis added).

132. Cf. *Milgram v. Loew's Inc.*, 192 F.2d 579 (3d Cir. 1951) (injury finding of conspiracy based *only* on uniform response of unaffiliated competitors upheld; holding may have been bolstered by defendants' "past proclivity" to unlawful conduct, as shown by the decision in the *Paramount* case, 334 U.S. 131 (1948); see the court's reference, 192 F.2d 579 584); *Goldman Theatres, Inc. v. Loew's, Inc.*, 150 F.2d 738 (3d Cir. 1945) ("Uniform participation by competitors in a particular system of doing business where each is aware of the other's activities, the effect of which is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy," shifting the burden of rebuttal to defendants. *Id.* at 743, 745.) Prior cases had upheld inferences of conspiracy from parallel action. *Interstate Circuit Inc. v. United States*, 306 U.S. 208 (1939) (but plan was known to the parties engaging in parallel action); *American Tobacco Company v. United States*, 328 U.S. 781 (1946) (parallel price movements in cigarette sales, parallel buying practices in leaf market); cf. *FTC v. Cement Institute*, 333 U.S. 683 (1948) (concerted maintenance of basing point system). See Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. OF CHI. L. REV. 567, 580-6 (1947).

Act. Since courts may insist that only an individual's action taken with competitive business judgment can rebut such an inference of conspiracy,<sup>133</sup> refusals to deal aimed at price stabilization stand small chance of successful rebuttal.

#### CONCLUSION

The *Schwegmann* Case, unless overruled by Congress, may have destroyed workable Fair Trade. When non-signer price cutters can obtain supplies, their price competition forces signing retailers to follow suit or lose their markets. In this way, the resale price maintenance structure must collapse. And producers cannot easily cut off supplies to price cutters. Not only can few producers afford isolation from substantial markets, but refusals to sell incur ever-greater legal risks. Under the law today, individual refusals cannot be coupled with policing or inspection for identifying buyers who can be "safely" supplied. Group boycotts, long illegal *per se*, may soon encompass individual refusals collectivized by flourishing conspiracy doctrine. Thus, but for the unlikely unanimity of all possible distributive outlets in signing Fair Trade contracts, Fair Trade must eke out a moribund existence in the shadow of the Sherman Act.

Congress should not revive Fair Trade.<sup>134</sup> Where effective, Fair Trade blocks consumers' receipt of modern mass distribution benefits.<sup>135</sup> Price competition on the retail level is stifled; pressures for streamlining distribution channels are relaxed; established producers' grip on price is strengthened. In sum, Fair Trade stands in the way of competitive change. Legalized resale price maintenance, a product of the depression-spurred quest for universal economic security, could once perhaps have been justified as an emergency stitch in a rent social fabric. But, in an inflationary economy of full employment, Congressional policy should focus on reducing high distribution costs. Congress, therefore, not only should refrain from bolstering Fair Trade; it should also reexamine other depression-spawned legislation that deadens competitive reform in distribution and has long outlived its need. Miller-

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133. *Fanchon & Marco v. Paramount Pictures, Inc.*, 100 F. Supp. 84 (S.D. Cal. 1951). "[N]o parallelism, conscious or unconscious, can overcome a finding of reasonableness." *Id.* at 104. See *Pevely Dairy Co. v. United States*, 178 F.2d 363, 366-71 (8th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950) (in criminal case, circumstantial evidence of conspiracy must "be inconsistent with any other rational conclusion than that of guilt of the defendants." *Id.* at 367.).

134. For pending legislation to reinstate the non-signer provisions of Fair Trade, see *Wall Street Journal*, Dec 12, 1951, p. 1, col. 1; *N.Y. Times*, Feb. 3, 1952, sec. 3, p. 1, col. 2. See Release, American Fair Trade Council, Feb. 3, 1952; CCH TRADE REG. REP. Jan. 31, 1952 p. 4.

135. FTC samplings in Fair Trade and non-Fair Trade areas indicate that the general level of prices on fair traded items increased. Meanwhile the general price level of similar non-fair traded items decreased. FTC REPORT at 639-710. See Schachtman, *supra* note 62, at 580.

Tydings, Robinson-Patman<sup>136</sup> and State Sales-below-Cost statutes<sup>137</sup> are tarnished symbols of another day.<sup>138</sup>

136. For recent exhaustive and critical analysis of the Robinson-Patman Act, See Rowe, *Price Discrimination, Competition and Confusion: Another Look at Robinson-Patman*, 60 YALE L. J. 929 (1951). And see Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1334-37 (1948); *Integration and the Outlook for the Future*, CCH ANTITRUST LAW SYMPOSIUM 135, 138-40 (1951).

137. For comprehensive critical treatment of Unfair Practices Acts, consult Comment, *Sales Below Cost Prohibitions; Private Price Fixing Under State Law*, 57 YALE L. J. 391 (1948). See also GREYER, *PRICE CONTROL UNDER FAIR TRADE LEGISLATION* (1939); McAllister, *Price Control by Law in the United States. A Survey*, 4 LAW & CONTEMP. PROB. 273 (1937). Often mirroring the Robinson-Patman Act, the 31 state statutes bar the sale of goods at less than sellers' cost with intent to injure competitors. But since intent is usually implied from the result, the effect of the acts is to brand illegal all sales below "cost." For text of the statutes see 2 CCH TRADE REG. REP. ¶ 8002 *et seq.*

138. Compare the recent announcement of the Attorney-General: "The Department of Justice is seriously concerned over reports which have come to its attention concerning alleged violations of the Federal Antitrust laws by concerted efforts on the part of manufacturers and distributors of commodities which move in interstate commerce to suppress and eliminate competition in the wholesale and retail sale of such commodities. The decision of the Supreme Court on May 21, 1951, in *Schwegmann Brothers et al v. Calvert Distillers Corporation* holding that attempts to force persons who have not entered into so-called "Fair Trade" contracts to adhere to or maintain minimum resale prices are not exempted from the Sherman Act, has apparently given rise to various attempts to prevent price competition by non-signers.

Those who are engaged in programs or schemes of the following type, involving commodities which flow in interstate commerce should know that they may be subject to criminal prosecution: agreements among competing retailers to maintain and adhere to specified minimum prices; agreements to coerce and induce wholesalers or manufacturers, through threat of boycott or other reprisals to refrain from selling to price cutting retailers; agreements to coerce or induce manufacturers or wholesalers to enter into so-called "Fair Trade Contracts"; agreements to coerce or force retailers to sign such contracts; agreements on the prices or margins of profits which should be set forth on such contracts and or methods to require producers or wholesalers to specify certain prices or markups in such contracts." Dep't of Justice Release, July 18, 1951, quoted in 2 CCH TRADE REG. REP. ¶ 7076.